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IN THE

Supreme Court of the United States

October Term, 1967.

No. 455.

CLAYTON H. STIEF,

Petitioner,

v.

J. A. SEXAUER MANUFACTURING CO., INC.

and

DIAMOND ALKALI COMPANY,

Respondents.

REPLY TO BRIEF OF RESPONDENT, SEXAUER.

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REPLY TO BRIEF OF RESPONDENT, SEXAUER.

I. Respondent's Brief Relies Entirely Upon Pennsylvania Cases Specifically Disapproved in Later Cases in the Supreme Court of Pennsylvania.

Right at the outset respondent's own brief demonstrates how legally fallacious its reasoning is and how much in error the Courts below were which followed it. Barraged by the contention in petitioner's brief in chief that he has been deprived of the right to trial by jury through the avenue of refusing or failing to apply Pennsylvania law in this case as required under *Erie Railroad Co. v. Tompkins,* 304 U. S. 64, 58 S. Ct. 817 (1938) respondent falls back upon an argument it never heretofore made and asserts that the Courts below did in fact follow Pennsylvania law. To establish this it searched for Pennsylvania cases to support the theory of the Courts below in directing verdicts for the respondents. In the statement of the Question Presented it relies primarily upon a principle of law which

is no longer the law of Pennsylvania. It quotes from *Hopkins v. E. I. Dupont de Nemours & Co.*, 212 F. 2d 623, 625 (3rd Cir.) decided in 1954 which states:

> "... where plaintiff's evidence supports an inference that excludes the liability of the defendant just as strongly as an inference that comprehends liability, a jury would have to engage in speculation and conjecture in order to attribute the accident to one rather than the other."

Indeed more expressly its brief then goes on to cite *Ruppert et al. v. Brooklyn Heights R. R. Co.*, 154 N. Y. 90 in which at p. 93 the Court said:

> "It is entirely true that a material fact in a civil or criminal action may be established by circumstantial evidence, but the circumstances must be such as to lead fairly and reasonably to the conclusion sought to be established *and to exclude any other hypothesis fairly and reasonably.*" (Emphasis supplied.)

This is simply no longer the law of Pennsylvania. In 1959 the Supreme Court of Pennsylvania decided *Smith v. Bell Telephone Co. of Pa.*, 397 Pa. 134, 153 A. 2d 477 (1959). The United States Court of Appeals for the Third Circuit has faithfully followed *Smith v. Bell, supra* in *Yeager v. J. R. Christ Co.*, 364 F. 2d 96, 101 (1966). In *Smith, supra,* Mr. Justice McBride specifically disapproved that statement and rule which respondent quotes and necessarily must rely on from *Hopkins, supra.* After quoting from earlier cases the Pennsylvania Supreme Court in *Smith, supra* said at p. 137:

> "The formula that 'the circumstances must be so strong as to preclude the possibility of injury in any other way and provide as the only reasonable inference the conclusion plaintiff advances' is not a correct statement of the rule to be applied by the judge on deciding a motion for either a nonsuit or binding instructions. If that were the rule what would be the province of

the jury? In no case where there was more than one reasonable inference would the jury be permitted to decide. Insofar as this rule is stated in our cases it is disapproved."

The Court then in footnote 1, p. 137 specifically cited some 17 cases which had quoted and relied on the erroneous rule that a plaintiff must exclude all possibility of injury which might exculpate the defendant. Those cases relied for authority on five cases cited in respondent's brief here in support of the action of the lower courts here in directing verdicts for the defendants. Now those cases have been specifically disapproved by the Court in its opinion in *Smith, supra.* Those cases are: (1) *Ault v. Penna. R. R.,* 381 Pa. 496 (1955) which cites *Anderson v. Reading,* 306 Pa. 246; (2) *Ebersole v. Beistline,* 368 Pa. 12 (1961) which cites *Houston v. Republican Athletic Assoc.,* 343 Pa. 218; (3) *Foley v. The Pittsburg-Des Moines Co.,* 363 Pa. 1 (1949) cites *Sandt v. North Wales,* 214 Pa. 215 p. 24 [and] *Houston v. Republican Athletic Assoc.,* 343 Pa. 218 [and] *Fix v. Penna. Power & Light,* 346 Pa. 598; (4) *Donaldson v. Pittsburgh Railway Co.,* 358 Pa. 33 (1947) which cites *Houston v. Republican Athletic Assoc.,* 343 Pa. 218 p. 37; and (5) *Davis v. Moylan,* 354 Pa. 508 (1946) which cites *Gausman v. Pearson,* 248 Pa. 348.

So as to leave no doubt about what the rule now is in Pennsylvania the Court then described in clear language the relationship between the court and the jury. It made this statement in the terms of the "power" of the court and said:

". . . *it is beyond the power of the court* to say whether two or more reasonable inferences are 'equal'. True enough the trial judge has to do something like this in deciding a motion for a new trial based on the weight of the evidence but no such rule governs him in deciding whether a case is submissible to a jury." (Emphasis supplied) p. 138.

The Court then turned to the cases involving circumstantial evidence and cautioned the lower courts as follows at p. 139:

> "The right of a litigant to have the jury pass upon the facts is not to be foreclosed just because the judge believes that a reasonable man might properly find either way. A substantial part of the right to trial by jury is taken away when judges withdraw close cases from the jury." *

The Pennsylvania Supreme Court revealed the source of its new rule that compels submission to the jury of questions of negligence and causation when in the posture where the evidence supports both liability or non-liability dependent on the choice of the fact-finder. It relied on and adopted *Lavender v. Kurn*, 327 U. S. 645 (1946) when it decided *Antonelli v. Tumolo*, 390 Pa. 68, 132 A. 2d 285 (1957).

Actually the Pennsylvania court in *Smith, supra* approached the problem in the same manner as did Judge Friendly in his dissent in this case. The Pennsylvania court said at p. 138:

> "Clearly this does not mean that the jury may not draw inferences based upon all the evidence and the jurors' own knowledge and experiences, [in essence 'common sense'] for that is, of course, the very heart of the jury's function. It means only that the evidence presented must be such that by reasoning from it, without resort to prejudice or guess, a jury can reach the conclusion sought by plaintiff, and not that that conclusion must be the *only* one which logically can be reached." (Emphasis supplied.)

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* Indeed Judge Maris in *Wigder v. Errickson*, 339 F. 2d 32, 34 (3 Cir., 1964), noted that under the Pennsylvania rule "a measure of speculation and conjecture would have been required on the part of the jury is immaterial since, as we have seen, there was evidence from which a conclusion of negligence might have been drawn."

Judge Friendly said: (Appendix 19a):

> "Since the only alternative explanation offered by Sexauer, of a free fall of liquid caused by the melting of the ice, failed to account for the wide spread of the liquid through the pantry, the jury would have been justified in accepting plaintiff's theory. As Judge Medina has recently said, 'But there are cases where *common sense* is more reliable than any amount of expert witnesses, and this is one of those cases.'' Achilles v. New England Tree Expert Co., 369 F. 2d 72, 73 (2 Cir. 1966). (Emphasis supplied.)

Respondent's brief and its reliance on the quote from *Hopkins, supra* lays bare the approach of the majority in the Court of Appeals in sustaining directed verdicts for both defendants on the whole record. In essence the majority held that plaintiff had to exclude every cause for which defendant would not be liable. In so doing the Court did and respondent now seeks to deprive the plaintiff of his right to trial by jury as guaranteed by the VII Amendment and ignores the command of *Erie Railroad Co. v. Tomkins, supra,* that required the Federal Court in New York to follow the Pennsylvania rule.[1]

Actually the conclusion of respondent's brief lets the cat out of the bag. Believing that the statement from *Hopkins, supra* is the present law of Pennsylvania, respondent states at pp. 28, 29:

> "*Since it is at least as likely as that that happened as what petitioner claimed happened* (we submit that the free fall is the true explanation for what occurred), *respondent may not, under Pennsylvania law, be liable* (Hopkins v. E. I. Dupont de Nemour & Co., 212 F. 2d 623 . . ." (Emphasis supplied.)

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1. Whatever the law of New York might be is irrelevant. It was a disregard of this Court's mandate to apply it. Respondent cites no fewer than 13 New York cases in support of this decision. They simply cannot be given any consideration except to illustrate what the majority obviously did. See its citation of *Ruppert v. Brooklyn Heights R. R. Co., supra,* which follows that rule.

Even factually assuming that a free fall of ice as contended by Respondent is a possible explanation of the accident, *Smith supra* teaches that under such circumstances it is "beyond the power of the court to say whether two or more reasonable inferences are 'equal' and . . . "no such rule governs him [the Court] in deciding whether a case is submissible to a jury." The holding of the Court of Appeals in this case just simply ignores the vast progeny of *Erie v. Tompkins, supra,* and through it *Smith v. Bell Telephone Co., supra,* and their teaching.

II. Does Huddleston v. Dwyer, 322 U. S. 232, 237 (1944) Apply Here?

The respondent seeks to foreclose a review by this Court of the acts of the Court of Appeals for the Second Circuit by its reliance on *Huddleston v. Dwyer, supra,* p. 29 of its brief in this Court. The case is inapposite. That case merely holds that "the considered determination of questions of state law by intermediate Federal Appellate Courts are ordinarily accepted by this court". But this is not such a case. Here the Court of Appeals for the Second Circuit was not asserting the state law of one of the state courts within its circuit with which it would have the familiarity that justifies this rule. Here the Federal Court of Appeals in New York was interpreting Pennsylvania law with which it has but little experience and its power over it is certainly in no way binding on this Court. Accordingly, *Huddleston v. Dwyer, supra* is meaningless against the physical background of this case.

III. The Evidence Adequately Supplied All the Necessary Facts Required for Submission to the Jury.

Respondent keeps reiterating that it did not know that its product "Mule Kick" would in combination with galvanized pipe (zinc) produce hydrogen which could explode and at great length splatter this solution, as a result of which it literally burned out petitioner's eyes. To the

contrary, Mr. Springhorn, the assistant to the President of Sexauer conceded his knowledge of this fact. Putting this to one side the simple answer is that under Pennsylvania law which under *Erie v. Tompkins, supra* the Court of Appeals was required to follow, the distributor of a product *must* affirmatively learn and know what its product will do and the extent of its potential for harm. In *Pope v. Reading,* 304 Pa. 326, 156 A. 106 (1931) the Pennsylvania court said just that when at p. 333 the Court said:

> ". . . at common law it was held that every man must have some knowledge 'of the quality of his beast' 1 Hale P. C. 430 and use appropriate means to keep that beast from harming people . . ."

Although that case was brought to the attention of the Court of Appeals, that Court ignored *Pope, supra.* It did not cite or discuss it. And neither does respondent. Another panel of the Court of Appeals for the Second Circuit did in another case however hold a plaintiff entitled to a presumption that a similarly situated defendant was aware of the possibility of injury from the use of its product in construing Massachusetts law. In *Wright v. Carter Products,* 244 F. 2d 53, 59 (C. A. 2 1957) the Court said at p. 59:

> "Although not considered below, or raised upon appeal, we would point out that the plaintiffs may be entitled to the benefit of a presumption that the defendant was aware of the possibility of injury from the use of its product. 'In Massachusetts the rule seems to be that every manufacturer is presumed to know the nature and qualities of his products * * *'".

And as we have just noted this is undoubtedly the rule of Pennsylvania, *Pope, supra.* See also *Roth v. Bankers Securities Corp.,* 242 F. 2d 509, 510 C. A. 3.* By ignoring

* In Roth, a pedestrian leaned against a special type glass structural window which collapsed. Held: the owner should have realized that pedestrians might lean against the window and was therefore under a duty to affirmatively ascertain the tensile strength of the glass

those cases and their holding the courts below have deprived plaintiff of his right to trial by jury and conflicts with *Erie, R. R. v. Tompkins, supra.*

Wright v. Carter, supra is of additional great interest because it so devastatingly disposes of the argument on p. 10 of respondent's brief that:

> "The proof was that in the 5 years prior to 1960, 3,800,000 cans of 'Mule-Kick' have been manufactured and used (1038a). There is no suggestion that during those years there had been so much as one complaint of any such incident as here allegedly occurred.
> Why, in all reason, should a warning be given of the hazards of an explosion or dangerous pressures caused by the liberation of hydrogen induced by the reaction of sodium hydroxide with zinc elements fortuitously present in material clogging a drain when, in all the years of practical experience no such incident was ever heard of?"

Said the Court in *Wright v. Carter Products,* 244 F. 2d 53 (1957) at p. 56:

> "Evidence was also introduced tending to establish that prior to June 1951 the defendant was aware of this peculiar property of its product, for in the four years from 1948 to 1951, the defendant, according to its own files, had received 373 complaints of skin irritation allegedly caused by Arrid. *During this same period, however, the defendant had sold over 82,000,000 jars.* The plaintiffs also attempted unsuccessfully to introduce findings of the Federal Trade Commission, affirmed by a court of appeals prior to Mrs. Wright's purchase in 1951, to the effect that the use of Arrid will cause dermatitis in some people.

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in advance and would thereby have realized it was not fit for that purpose and this was so held even though there was no proof of similar accidents having happened and the glass was installed by an independent contractor.

> No evidence was adduced at the trial to show that the defendant was negligent in the preparation of the particular batch of Arrid that precipitated Mrs. Wright's condition. Thus the trial court concluded that the only issue of negligence presented was whether the mere use of aluminum sulfate in Arrid was sufficient to charge the manufacturer with liability to these plaintiffs when no warning was given by it of the possible harmful effect that Arrid might have to a very small proportion of the potential users of that deodorant.
>
> Relying on the statistical infrequency of injury caused by the use of Arrid, the trial court held that the defendant was not negligent, and that 'the injury suffered by the plaintiff was the result of her own allergy rather than being caused by any inherent defect in the product itself.' The court below apparently believed, since the evidence before it indicated that only a minuscule percentage of potential customers could be endangered by using Arrid, that the defendant was under no duty to warn of any harmful propensities the product might have despite the defendant's own knowledge thereof. *With such a conclusion we cannot agree, for we believe that duties to warn are not, in all cases, measured by solely quantitative standards. We believe that the trial court erred in defining the scope of this defendant-manufacturer's liability, and we remand the case for further findings in the light of our discussion herein.*'' (Emphasis supplied.)

Respondent's brief and the evidence itself convicts it of knowledge of the danger of splattering which this product did do here. At pp. 18 and 19 respondent argues that the label did warn against splattering. But this was only about the hazard present while *mixing* the powder in water. It did *not* warn against potential splattering that could be caused by an explosion which it knew or should have known

would occur should the product contact zinc and produce hydrogen after it was lodged in the galvanized pipe. That was the risk present here. The risk of an explosion is *always* present when this solution is put into galvanized pipe where there is an unclosed opening. The President of Sexauer admitted he knew it could do so for he knew hydrogen was extremely explosive. And yet no warning against this type of explosion and splattering of this extent —some ten feet across the room and eight foot high was given. This was the particular hazard a layman unversed in chemistry would not know. He had put the solution into the pipe the day before. Little did he know when he opened the plug that he was unleashing a blinding fury. So he only finger-tightened the plug. And when the hydrogen gas fell below the opening whether because of the pressure of the water above it or the free fall caused by the Prestolite heating of the pipe, a maelstrom tore loose. That danger, an opening in the cage [pipe] through which the wild beast could blast in its expanding drive to escape is to a chemist a very real probability. And as to that basic, but to the layman unappreciated risk, no warning at all was given. The jury alone had the right and duty to say whether such conduct [omission] was negligence.

Respondent also argues that New York cases support the proposition that there is no liability in the absence of proof of similar mishappening *and* proof that the precise set of facts had previously been reported or recorded and hence is an unforeseeable hazard. There is no affirmative proof that such an accident had not previously occurred. Secondly this is not Pennsylvania law on foreseeability.

> "Foreseeability does not mean that precise hazard or exact consequences that were encountered should have been foreseen". *Parris v. Bruder Co.*, 261 F. 2d 406 E. D. Pa. (1966). This case cites a host of Pennsylvania cases so holding.

Defendant knew that if this mixture in *some* way contacted zinc it would create hydrogen, a highly expanding explosive gas. Certainly it knew that galvanized pipe and fittings have zinc coatings on them which inevitably the solution would contact and mix with as it went down the pipe. All that restrained it from explosion on other occasions was that no openings were exposed as here, after the solution was put in the pipes. On other occasions when open, users may not have as here applied heat which the respondents themselves recommended to users on the label. Petitioner did not know the potential for harm from such a combination of facts. But respondent was obliged to know and warn against this danger. This it did not do. This is Pennsylvania law. It was controlling. Whatever the source of contrary holdings, they were error in the Penna. case. See also *McDougall v. Penna. Power & Light Co.*, 311 Pa. 387, 392, 396-7 (1933). Respondent's brief cites New York cases seemingly opposed. But they are not authority here and should have been ignored. To the contrary they were religously followed and petitioner was denied his right to trial on these factual issues.

IV. Diamond Alkali.

Diamond alkali has not filed a brief replying to petitioner's contention that under Pennsylvania law a jury could have found it negligent. Under the evidence a jury could have found that Diamond was fully aware of the label Sexauer put on its cans of sodium hydroxide it had purchased from Diamond in bulk. It knew that this label did not supply the vital warnings of the explosive potential of this chemical that it, Diamond felt it necessary to put on the drums in which it shipped this product to Sexauer. We have covered in detail in our brief in chief on p. 17, how the failure to do something about this omission by Sexauer puts liability on Diamond under Penna. law which adopts Sec. 388 of the Restatement of Torts 2nd.

Long before Section 388 of the Restatement of Torts was written Pennsylvania had adopted that principle and held that

> **"warning to the intermediate party or his discovery of the danger, did not relieve the original supplier of liability."** *Trusty v. Patterson,* 299 Pa. 469, 149 Atl. 717 (1930).

The Courts below did not apply Penna. law as to this. Therein one finds a violation of the mandate of *Erie R. R. v. Tompkins, supra.* Since it cannot answer this charge, Diamond assumes the ostrich position, buries its head in the sand and makes no reply at all.

Conclusion.

We have urged the following reasons why the petition for certiorari should be granted. The respondents' brief does not and we believe cannot answer them.

1. There remains undecided the question heretofore specifically reserved by this Court in *Byrd v. Blue Ridge Rural Electric Co-operative,* 356 U. S. 525, 538, 539, 78 S. Ct. 893, 901, 902, 2 Law Ed. 2d 953. It appeared on page 539 of that opinion as footnote 10. It questions whether the evaluation of factual proof offered in support of a legal question, there, statutory immunity for torts, here the burden of proof of negligence or causation, is or may under a local rule be a function for the judge exclusively or whether in the protection of the right to trial by jury, it must be submitted to a jury for determination. We respectfully submit that where there is any evidence which factually supports the legal contention under consideration, that the court is not free to decide it on its own, but must leave it as an issue for the jury. This problem respondents very carefully skirted and ignored in the reply brief.

2. Is the rule enunciated in *Lavender v. Kurn,* 327 U. S. 645 (1946) that if there is any evidence to support a contention of a party that that issue must be submitted

to the jury even though there be strong evidence to the contrary one of general application in the Federal Courts in all litigation, or is it limited to FELA and Jones Act cases?

3. That assuming that a matter arises at the trial level in the United States District Courts, solely by reason of diversity of citizenship, and raises questions of local law of negligence, is the Federal District Court obliged nonetheless to apply the federal test of *Lavender v. Kurn, supra,* to determine whether the plaintiff has met his burden of proving negligence regardless of the rule that obtains in the non-federal courts of the state of occurrence?

4. Should this Court answer #3 in the negative, in a case lodged in the United States District Court for the Southern District of New York that came there purely by reason of diversity of citizenship and occurred in Pennsylvania, is the District Court in New York by the mandate of *Erie R. R. v. Tompkins,* 304 U. S. 64, 58 S. Ct. 817 (1938), required under these circumstances to apply Pennsylvania evidence law and not New York state court evidence rules to assure the same result as would follow if the case were tried in Pennsylvania? *Guarantee Trust Co. of New York v. York,* 362 U. S. 99, 65 S. Ct. 1464.

This case cries out for the grant of certiorari. This blind man was "unwarrantably deprive[d] . . . of his right to a jury trial". But even more important is the fact that a basic question of procedural law, national in scope is here involved. What is the test of when a prima facie case is established in Federal Courts today? Must a litigant eliminate every other possible inference even though there is evidence to support liability before his case can be submitted to the jury? *Lavender v. Kurn,* 327 U. S. 645 (1946) says a litigant need not go so far. The Court below says he must do so. It apparently thought that rule applies only to Federal Employers' Liability Act (45 U. S. 51 et seq.) cases. We believe it is a rule that must be applied

in all types of cases in the Federal courts even when the case arises in a state where the more restrictive rule is normally followed. But at any rate since this case arose in Pennsylvania, certainly the Federal Court in New York had no right to impose the New York state court rule of burden of proof on this petitioner instead of the rule of the locus of the occurrence in Pennsylvania.

Respectfully submitted,

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